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# Supreme Court of the United States

OCTOBER TERM, 1934—No.

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BALTIMORE & CAROLINA LINE, INC.,
*(Defendant-Appellant below),*
*Petitioner,*

—against—

DONALD REDMAN,
*(Plaintiff-Respondent below),*
*Respondent.*

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## *BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.*

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## FIRST POINT.

**The Circuit Court of Appeals properly interpreted and applied the decision of this Court in *The Slocum* case in holding that a new trial must be granted whenever a verdict is reversed by a Federal Appellate Court on account of an error of law.**

In *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, it was held that where a Federal Appellate Court sets aside a verdict for insufficiency in the evidence, it is bound to grant a new trial, pursuant to the provisions of the Seventh Amendment of the Federal Constitution, which are controlling in the Federal Courts, even when in conflict with state statute or practice. It was further held that under the rules of the common law, when the Court sets aside a verdict there arises the same

right of trial by jury as in the first instance and that in such trial by jury, the right to which is secured by the Seventh Amendment, both the Court and jury are essential factors. It was further held that the rules of the common law in respect to demurrers to evidence and non-suits furnish no warrant for a Federal Court setting aside a verdict and rendering judgment on the evidence without a new trial. It was further held that the right to a new trial on the vacation of a favorable verdict in a common law action is a matter of substance and not of form.

These rules were followed by this Court in *Pedersen* v. *Delaware, Lackawanna & Western RR. Co.*, 229 U. S. 146. In *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U. S. 494, referred to in petitioner's brief, the ruling was not in any respect altered.

In the case at bar, the facts are analogous with those in the *Slocum* case—that is, in both cases the Appellate Court reversed a judgment for the plaintiff on the ground that a verdict should have been directed for the defendant. In the case at bar, the Circuit Court of Appeals, profiting by the decision of this Court in the *Slocum* case, rightly held that under such circumstances, the plaintiff was entitled to a new trial. Quoting from the opinion in the *Slocum* case on pages 8 and 9 of its brief, counsel for petitioner points out the distinction there made between a non-suit and a directed verdict, stressing the point that the former leaves the merits undetermined while the latter necessarily involves an adjudication of the same. The petitioner's brief apparently concedes that where an Appellate Court reverses a judgment for the plaintiff on the ground that a verdict should have been directed for the defendant, a new trial must be granted, since the direction of a verdict involves an adjudication of the merits through the accustomed co-

operation of the Court and the jury, which can only be had upon such new trial.

However, it would seem to be petitioner's whole contention on this application that as there was never any question of fact for submission to a jury, plaintiff should have been non-suited and that therefore the Appellate Court ought to have directed the District Court to enter judgment dismissing the complaint without prejudice (see Petition, pp. 1, 2, 3, 5; see Petitioner's Brief, pp. 8, 11). At page 8 of its brief, the petitioner states:

> "Here, the Circuit Court of Appeals was not asked to decide *finally any issue of fact,* but was called upon to declare that *no triable issue of fact was presented by the evidence* and to dismiss the complaint *without prejudice.*"

But the petitioner has wholly overlooked the fact that the Circuit Court of Appeals did not actually hold that the complaint should have been dismissed, but merely that the evidence was so overwhelmingly in favor of the defendant that a verdict should have been directed in its favor. For the purpose of deciding this application it would appear to be immaterial as to whether or not the Circuit Court of Appeals had power to direct the dismissal of the complaint without prejudice after reversing the verdict. The fact remains that the Circuit Court of Appeals did not actually hold that the plaintiff should have been non-suited, but merely that a verdict should have been directed in favor of the defendant, and yet this Court is now asked to tell the Circuit Court of Appeals to change its decision to one holding that the complaint should have been dismissed and to instruct said Circuit Court to order the District Court to dismiss the complaint without a new trial—all without any review of the evidence or any argument as to why the Circuit Court of Appeals erred in holding that a verdict

should have been directed for the defendant and in failing to hold that the complaint should have been dismissed.

But even assuming that the Circuit Court of Appeals had decided that the complaint should have been dismissed and had reversed on that ground, it would still have been compelled to grant a new trial. *Slocum* v. *New York Life Insurance Co. supra.* There it was pointed out by the Court (pp. 381, 382) that at common law a motion "in arrest of judgment" must always be grounded "on something apparent on the face of the pleadings", and that the rules of the Common Law in respect to demurrers to evidence and non-suits furnish no warrant for a Federal Court setting aside a verdict and rendering judgment on the evidence without a new trial (pp. 388-395). The Court further drew the distinction between a motion in arrest of judgment and a motion for judgment *non obstante veredicto,* pointing out that the first-named motion could only be made by the defendant and the last-named could only be made by the plaintiff, and that both motions must necessarily be based upon defects appearing upon the face of the pleadings. And the Court said at page 382:

> "Thus, it will be perceived that the rules of the common law, permitting a judgment *non obstante veredicto* and the arrest of judgment on a verdict, did not embrace cases like the present, but only those in which the pleadings presented no material issue requiring a trial or verdict" (p. 382).

The Court further held that the action of the Appellate Court in setting aside a verdict must be tested by the rules of the common law which required the granting of a new trial (pp. 379, 380). The Court said:

> "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the

issues of fact and to direct a judgment accordingly must be tested by the rules of the common law; * * *" (pp. 379, 380).

And again at page 380, the Court said:

> "While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. * * *"

The Court went on to say that the true test as to whether or not there was a right of trial by jury was to be determined by an inspection of the pleadings and not by an examination of the evidence (p. 398). The Court said:

> *"Whether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings and not by an examination of the evidence. If the pleadings present material issues of fact, either party is entitled to have them tried to the court and a jury, and this is as true of a second trial as of the first.* Whether the evidence is sufficient to sustain a verdict for one party or the other is quite another matter and does not affect the mode of trial, but only the duty of the court in instructing the jury and of the latter in giving their verdict. The issues to which the jury must respond are those presented by the pleadings, and this whether the evidence be disputed or undisputed and whether it be ample or meagre. *To speak, therefore, of the evidence as determinative of the right to a*

*trial by jury is to confuse the test of that right with a different test applicable only in determining whether a particular verdict should be directed.*

In the present case certain well-defined issues of fact were presented by the pleadings, which the plaintiff, as also the defendant, was entitled by the Constitution to have tried to the court and a jury. Such a trial was had and resulted in a general verdict resolving all the issues in the plaintiff's favor. That verdict operated, under the Constitution, to prevent a re-examination of the issues save on a new trial granted by the trial court in the exercise of its discretion or ordered by the appellate court for error of law. * * *" (Italics ours.)

## SECOND POINT.

**The decision of the Circuit Court of Appeals is in conformity with the interpretation placed upon the *Slocum* case by subsequent decisions of this and lower federal courts.**

As already stated, the facts in the case at bar are exactly analogous with those in the *Slocum* case—that is, in both cases the Court reversed on the ground that the lower court should have directed a verdict for the defendant. In the *Slocum* case, the Court held that a new trial should have been granted, and in the case at bar the Court granted such new trial. This rule was directly followed by the Supreme Court in *Pederson* v. *Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146. None of the other decisions alluded to in petitioner's brief dealt with the same state of facts, and the rule laid down in the *Slocum* case remains unaltered. The petitioner impliedly concedes this when it asks this Court to overrule the *Slocum* and *Pederson* cases and adopt the views contained in the dissenting opinions

in those cases (see Petitioner's Brief, pp. 14-18). It is submitted that no cogent reason has been advanced for overruling the decisions of this Court which have been in effect for over twenty years.

## LAST POINT.

### The prayer of the petitioner should be denied.

Respondent respectfully submits that the questions of law involved on this application have already repeatedly been decided by this Court and the lower federal courts with unanimous results under analogous states of fact, that no new question is here involved, and that there is no good reason why this Court should overrule settled law of twenty years' duration.

Respectfully submitted,

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*Counsel for Respondent.*

New York City, August, 1934.